Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-240 OF 1999
ABDUL MALIK ISHAK J
19 JANUARY 2000

Civil Procedure *— Costs — Security for costs — Foreign plaintiff — Exercise of discretion of court — Exclusion from — First Schedule of Reciprocal Enforcement of Judgments Act 1958 — Likelihood of plaintiff succeeding — Whether strong prima facie presumption that defendant will fail in defence — Whether detailed evaluation of merit of case necessary*

The plaintiff — an Indian citizen with an address in Mumbai, India — was the holder of a certificate from the Ministry of Labour, Government of India which authorized him to carry on the business of recruitment for deployment of Indian workers overseas. The plaintiff's head office was in Bombay while its branch office was in Madras. The first defendant was a company incorporated in Malaysia under the Companies Act 1965. The second defendant was said to be wholly owned by the first defendant. The plaintiff alleged that an individual by the name of Mohammad Ali Daud ('Ali'), who was described as the business development executive of the first defendant and appointed by the second defendant as the project manager, had approached the plaintiff for the purpose of recruiting workers in India to work in Malaysia for the defendants' project. The plaintiff agreed to become a recruiting agent for the defendants and to recruit workers for the defendants. It was the stand of the plaintiff that the contract was confirmed by way of a letter dated 16 April 1995 and a power of attorney dated 17 April 1995. The plaintiff alleged that the defendants had breached the contract and he had suffered loss and damage as a result of the breach. In the statement of defence, the defendants submitted, inter alia, that they had no knowledge of the letter dated 16 April 1995 together with the power of attorney and averred that the alleged communication between the plaintiff and Ali were only privy as between themselves and no one else. The defendants contended that the actions by Ali were not sufficient to constitute any intention to create legal relations between the plaintiff and the defendants. Thus there was no binding contract between them. The defendants had applied for security for cost against the plaintiff which was granted by the senior assistant registrar. The plaintiff appealed.

Held, dismissing the appeal:

(1) The plaintiff can safely be described to be ordinarily resident out of the jurisdiction. The plaintiff had no assets in Malaysia. It is purely a matter of discretion for the court to insist that the foreign plaintiff be ordered to give security for costs because it is the only just thing to do. Having regard to the circumstances of the case, the plaintiff should be ordered to pay security for

costs. The scales of justice tilted in favour of the defendants (see pp 569A, 571C–D). A

(2) Another good reason to order the plaintiff to give security for costs was that Madras was excluded from the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 and in the event the plaintiff were to lose his case, there was no restriction or no impediment for the plaintiff to move to Madras from Bombay or for that matter to any other excluded state in India to evade paying costs (see p 571F). B

(3) Of crucial important would be the likelihood of the plaintiff succeeding. The court may refuse the defendant's application for security for costs when there is a strong prima facie presumption that the defendant will fail in his defence. The defendants in the recent case were challenging all the points raised by the plaintiff and it cannot be said with certainty that the plaintiff would succeed. This was also not a case where, prima facie, the defendants would fail in their defence (see p 565G). C D

(4) There was no necessity at all at this juncture to go into a minute and in depth detail of the merits of the case. In evaluating the prospects of success of either party, the court must shy away from a very detailed evaluation of the merits of the case. Suffice for the court to say that there was available evidence to direct the plaintiff to provide security for costs (see pp 565I–566A). E

[Bahasa Malaysia summary

Plaintif — seorang rakyat India yang beralamat di Mumbai, India — merupakan seorang pemegang sijil daripada Kementerian Buruh, Kerajaan Negara India yang memberikuasa beliau untuk menjalankan perniagaan mengambil pekerja-pekerja bangsa India untuk berkhidmat di luar negeri. Pejabat utama plaintif adalah di Bombay manakala cawangannya di Madras. Defendan pertama merupakan sebuah syarikat yang diperbadankan di Malaysia di bawah Akta Syarikat 1965. Defendan kedua dikatakan dimiliki oleh defendan pertama. Plaintif mendakwa bahawa seorang individu bernama Mohammad Ali Daud ('Ali'), yang disifatkan sebagai eksekutif perkembangan perniagaan defendan pertama dan dilantik oleh defendan kedua sebagai pengurus projek, telah berjumpa dengan plaintif untuk tujuan mengambil pekerja di India untuk bekerja di Malaysia di bawah projek defendan-defendan. Plaintif bersetuju menjadi seorang ejen pengambilan untuk defendan-defendan dan untuk mengambil pekerja bagi pihak defendan-defendan. Plaintif berpendirian bahawa kontrak tersebut telah disahkan menerusi sepucuk surat bertarikh 16 April 1995 dan surat kuasa wakil bertarikh 17 April 1995. Plaintif mengatakan bahawa defendan-defendan telah memungkiri kontrak tersebut dan beliau telah menanggung kerugian dan kerosakan akibat kemungkiran tersebut. Dalam pernyataan F G H I

pembelaan, defendan-defendan berhujah, antara lain, bahawa mereka tidak tahu tentang surat bertarikh 16 April 1995 bersama dengan surat kuasa wakil dan bertegas bahawa komunikasi yang dikatakan di antara plaintif dan Ali hanyalah privi sesama mereka sendiri dan tidak sesiapa yang lain. Defendan-defendan berhujah bahawa tindakan yang diambil oleh Ali tidak mencukupi untuk membentuk apa-apa hasrat untuk mewujudkan hubungan undang-undang di antara plaintif dan defendan-defendan. Justeru itu, tidak terdapat sebarang kontrak yang mengikat di antara mereka. Defendan-defendan telah memohon cagaran untuk kos terhadap plaintif yang dibenarkan oleh penolong kanan pendaftar. Plaintif merayu.

Diputuskan, menolak rayuan tersebut:

(1) Plaintif bolehlah disifatkan biasanya menetap di luar bidang kuasa. Plaintif tidak memiliki aset di Malaysia. Adalah budi bicara mahkamah untuk berkeras bahawa plaintif asing diperintah supaya memberi cagaran untuk kos kerana adalah adil untuk berbuat demikian. Dengan mengambil kira keadaan kes, plaintif haruslah diperintah supaya membayar cagaran untuk kos. Dacing keadilan memihak kepada defendan-defendan (lihat ms 569A, 571C–D).

(2) Satu lagi alasan yang baik untuk memerintah plaintif supaya memberi cagaran untuk kos adalah bahawa Madras dikecualikan daripada Jadual Pertama Akta Penguatkuasaan Penghakiman Balasan 1958 dan andainya plaintif gagal dalam kesnya, tiada batasan atau halangan untuk plaintif berpindah ke Madras dari Bombay atau dalam pada itu ke mana-mana negeri yang dikecualikan di India untuk mengelak daripada membayar kos (lihat ms 571F).

(3) Yang amat penting sekali adalah kebarangkalian plaintif akan berjaya. Mahkamah boleh menolak permohonan defendan untuk cagaran untuk kos apabila terdapat suatu anggapan prima facie yang kukuh bahawa defendan akan gagal dalam pembelaannya. Defendan-defendan dalam kes ini mencabar semua hujah yang dibangkitkan oleh plaintif dan ia tidak boleh dikatakan dengan sebarang kepastian bahawa plaintif akan berjaya. Ini juga bukanlah kes di mana, dari segi prima facie, defendan-defendan akan gagal dalam pembelaan mereka (lihat ms 565G).

(4) Tiada apa-apa keperluan di tahap ini untuk meneliti merit kes secara terperinci. Dalam menilai peluang kejayaan mana-mana pihak, mahkamah mestilah jauhi daripada menjalani penilaian yang terlalu terperinci ke atas merit kes. Adalah mencukupi untuk mahkamah mengatakan bahawa terdapat keterangan untuk mengarah plaintif supaya menyediakan cagaran untuk kos (lihat ms 565I–566A).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1338–1369.

Cases referred to

Abdul Fattah Mogawan & Anor v MMC Power Sdn Bhd & Anor [1997] 5 CLJ 1 (refd)
Ace King Pte Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75 (refd)
Adarsh Pandit v Viking Engineering Sdn Bhd [1998] 2 AMR 1009 (refd)
Aeronave SPA & Anor v Westland Charters Ltd & Ors [1971] 1 WLR 1445; [1971] 3 All ER 531 (refd)
Alabama Portland Cement Co Ltd, Re [1909] WN 157 (refd)
Bell Wholesale Co Pty Ltd v Gates Export Corp (No 2) (1984) 8 ACLR 588 (refd)
Buckley v Bennell Design & Constructions Pty Ltd [1974] 1 ACLR 301 (refd)
Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates (Australia) Pty Ltd (1986) 11 ACLR 43 (refd)
Chellew v Brown [1923] 2 KB 844 (refd)
Compagnie Generale Des Eaux v Compagnie Generale Des Eaux Sdn Bhd [1993] 1 MLJ 55 (refd)
Crozat v Brogden [1894] 2 QB 30 (refd)
De St Martin v Davis & Co [1884] WN 86 (refd)
Egbert v Short [1907] 2 Ch 205 (refd)
Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404 (refd)
Harpur v Ariadne Australia Ltd [1984] 2 Qd R 523 (refd)
Heller Factors Pty Ltd v John Arnold's Surf Shop Pty Ltd (in liquidation) [1979] ACLC 40 (refd)
Ho Kai Neo (widow) & Anor v Tan Kim Tee & Anor [1940] MLJ 84 (refd)
Hogan v Hogan (No 2) [1924] 1 Ir R 14 (refd)
Hudson Strumpffabrik GmbH v Bentley Engineering Co Ltd [1962] 3 All ER 460; [1962] 2 QB 587 (refd)
JH Billington Ltd v Billington [1907] 2 KB 106 (refd)
Kasturi Palm Products v Palmex Industries Sdn Bhd [1986] 2 MLJ 310 (refd)
Levene v IRC [1928] AC 217 (refd)
Lysaght v IRC [1928] AC 234 (refd)
MA Productions Pty Ltd v Austarama Television Pty Ltd [1982] 1 ACLC 404 (refd)
Mavani v Ralli Bros Ltd [1973] 1 WLR 468 (refd)
Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd [1983] 1 ACLC 967 (refd)
Pittsburgh Crushed Steel Co v Jacob Marx & Co [1897] WN 36 (refd)
Polini v Gray [1879] Ch D 741 (refd)

Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 (refd)
Pray v Edie (1786) 1 TR 267; 99 ER 1087 (refd)
Shaik Ali v Shaik Mohamed [1963] MLJ 300 (refd)
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273 (refd)
Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor [1990] BCLC 263 (refd)
Westralian Gold Mines Ltd v Westralian Minerals & Drilling Pty Ltd (in liquidation) [1986] 1 ACLC 167 (refd)
Wilson v Tumman (1843) 6 Man & G 236 (refd)
Winterfield v Bradnum (1878) 3 QBD 324 (refd)

Legislation referred to

Companies Act 1965 s 447
Reciprocal Enforcement of Judgments Act 1958 First Schedule
Rules of the High Court 1980 O 23 r 1, O 24 r 1

DP Vijandran (*DP Vijandran & Associates*) for the plaintiff.
Collin Sequerah (*Zain & Co*) for the defendants.

Abdul Malik Ishak J:

Facts — a bird's eye view of all the circumstances of the case

The plaintiff is the sole proprietor of Dhanveer Enterprise and he trades under that name. The plaintiff is also the holder of a certificate from the Ministry of Labour, Government of India which certificate authorizes him to carry on the business of recruitment for deployment of Indian workers overseas. The plaintiff's head office is said to be at No 30G, Parveen Manzil, 2nd Floor, Bomanji Lane, Fort, Bombay 400001; while its branch office is at number 523, 1st Floor, NSK Nagar, Anna Nagar, Main Road, Madras 600106. In an affidavit affirmed on 28 July 1999 which was filed on 2 August 1999 as seen in encl 11 — which affidavit was deposed challenging the defendants' application for security for costs as seen in encl 7, the plaintiff proudly declared himself as an Indian citizen with an address at 7613213 (Sector VII), CGS Colony Antophill, Mumbai 400037, India.

The first defendant is described as a company incorporated in Malaysia under the Companies Act 1965 and having its registered office at 32nd Floor, Menara PNB, 201A, Jalan Tun Razak, 50400 Kuala Lumpur. The second defendant is also a company incorporated in Malaysia under the Companies Act 1965 and have its registered address just like that of the first defendant. It is said that the second defendant is wholly owned by the first defendant. It is also said that, at all material times, the first defendant was under the control and/or management and/or direction of the second defendant and with this in mind the first defendant is described as the agent of the second defendant.

The second defendant as a sub-contractor secured a project with the cooperation of a consortium (styled as 'MMCE-KEC Consortium') to

design, erect, execute, complete and maintain as well as to instal 500 KV and 275 KV transmission lines for phase 1 and phase 1A together with a transmission system development of 500 KV for Tenaga Nasional Berhad. In short, that project was in reference to contract TNB No: 241/95 under package TA5 — Pasir Gudang — Plentong — Bukit Batu Yong Peng (N), Johor.

An individual by the name of Mohammad Ali Daud ('Ali') was, at all times, described as the business development executive of the first defendant. Ali too was said to be appointed by the second defendant as the project manager of the abovementioned project. It is said that the defendant through Ali had approached the plaintiff for the purpose of recruiting workers in India to work in Malaysia for the said project. It was an alluring offer. The plaintiff grabbed hold of that offer. It is a paradise to work in Malaysia. As a melting pot, Malaysia attracts foreign workers be it labourers or professionals. The plaintiff agreed to become a recruiting agent for the defendants and to recruit workers for the defendants in Malaysia. As a recruiting agent, the plaintiff was entitled to collect the sum of 35,000 Indian rupees equivalent to approximately RM3,500 as his fees from each of the workers who would eventually be employed by the defendants. It was the stand of the plaintiff that the contract was confirmed by way of a documentation in the following terms:

(a) by a letter dated 16 April 1995 wherein the first defendant appointed the plaintiff to recruit Indian workers from India upon the terms as stated in that letter.

(b) the main terms of the recruitment were said to be as follows:

(i) that the recruited Indian workers would be employed for a period of two years;

(ii) that the recruited Indian workers would be provided with free accommodation and free medical care;

(iii) that free round trip air passages would be provided for each of the recruited Indian workers; and

(iv) that the salaries of the recruited Indian workers, on a monthly basis, would be categorized in this manner:

Categories	Salaries
(1) Engineers	RM2,000 to RM2,500
(2) Supervisors	RM1,300
(3) Skilled workers	RM1,000
(4) Unskilled workers	RM800

(c) by way of a power of attorney dated 17 April 1995, the first defendant appointed the plaintiff to recruit Indian workers from India and, at the same time, authorized the plaintiff to sign all the necessary documents and employment contracts and to arrange for the passports of the

recruited Indian workers from India and to obtain the necessary visa endorsements as well as to make the necessary transport arrangements for their onward movements to the work sites.

Blissfully thinking that everything had proceeded smoothly, the plaintiff then took the next course of action. It was said that the plaintiff then proceeded to advertise for the recruitment of Indian workers in Indian newspapers in India and thereafter shortlisted candidates to be interviewed by the defendants. On 23 April 1995, Ali together with two others arrived in Madras to interview the shortlisted candidates. It was said that Ali conducted the interviews for two solid days and on 24 May 1995 he left for Malaysia. The two others remained behind and continued to conduct further interviews. The interviews that were conducted were successful. Five hundred Indian workers were selected. It was said that the accommodation and other expenses incurred by Ali and the two others during their stay in Madras were borne by the plaintiff on the understanding that the plaintiff would be reimbursed by the defendants. Sometime on 11 July 1995, the second defendant submitted an application to the Immigration department in Malaysia for the approval of work permits for the Indian workers from India. The Malaysian Immigration department responded by letter dated 28 September 1995 addressed to the second defendant and approved the work permits for 264 Indian workers from India. This letter of approval was then extended to the plaintiff by the defendants so as to enable the plaintiff to process the visas for the selected Indian workers. Without further ado, the plaintiff proceeded to do the needful in order to prepare for the departure of 264 Indian workers to Malaysia to work on the project as employees of the defendants. The necessary papers were eventually processed. It was said that the 264 selected Indian workers left their respective jobs in India in order to prepare and make the necessary arrangements to leave for Malaysia to take up employment with the defendants. The plaintiff requested the defendants to send the air tickets for the selected Indian workers who were ready to proceed to Malaysia. The defendants responded and orally requested the plaintiff to purchase the air tickets on their behalf with the undertaking that it would be reimbursed. With that kind of undertaking, the plaintiff initially paid for the air tickets of 185 workers. Later, the plaintiff confirmed flight bookings for the first batch of 50 Indian workers that were scheduled to leave on 8 January 1996. Another second batch of 50 Indian workers were confirmed to leave on 8 January 1996. The plaintiff proceeded to fax the details of the flights to the defendants.

Sometime on 5 January 1996, it was said that the second defendant sent a letter to the chief immigration officer at Anna International Airport, Menambakkam, Madras requesting him not to allow any of the selected Indian workers to board the flight to Malaysia until further instructions from the defendants. On 6 January 1996, the plaintiff received a letter dated 4 January 1996 from the defendants disclaiming and/or repudiating the contracts and requesting the plaintiff not to send the Indian workers from India to go to Malaysia. Approximately on 9 March 1996, the plaintiff met Mohd Wafa Abdul Rahman ('Wafa') and it was said that Wafa represented

the defendants who had repudiated the contract and Wafa had told the plaintiff that the defendants did not consider themselves bound by the contract. The plaintiff then informed the defendants that the contract was considered as terminated and legal recourse would be pursued. For these reasons, the defendants were said to have breached the contract with the plaintiff. It was said that for these breaches, the plaintiff had suffered loss and damages — special as well as general. The plaintiff then proceeded to particularise the loss and damages in these terms:

(a) the plaintiff had purchased the air tickets on behalf of the defendants for the Indian workers and in the course of which had to pay 25% of the ticket fares as cancellation fees;

(b) the plaintiff had to travel to Malaysia on two occasions in order to finalise the recruitment of Indian workers;

(c) the plaintiff is facing several law suits in India initiated and instituted by the selected candidates that were destined to go to Malaysia;

(d) the plaintiff's recruiting licence has been suspended by the Government of India;

(e) the plaintiff's assets in India has been frozen by the Government of India;

(f) the plaintiff and his family members were living in daily fear of reprisals from the selected candidates who had lost their jobs;

(g) the plaintiff has lost his reputation, business and goodwill as a recruiting agent in India;

(h) the plaintiff has incurred several expenses for and on behalf of the defendants and or the defendants' representatives; and

(i) loss of profits that should come from the fees.

The plaintiff then proceeded to particularise the special damages incurred by him in this manner:

Particulars	Rupees	RM (Approximate)
(a) Advertisement Charges	207,987.950	20,798.79
(b) Hotel Bills of Ali & 2 Ors	256,953.81	25,695.38
(c) Food	120,000.00	12,000.00
(d) Stationaries, printing of files and courier services	250,000.00	25,000.00
(e) Telephone and fax bills	300,000.00	30,000.00
(f) Medical examination for selected workers (RS600 x 264)	158,400.00	15,840.00

(g)	25% cancellation charges on the price of tickets (RS13,545 x 185)	626,456.25	62,645.62
(h)	Visa Stamping at (RS162 x 185)	29,970.00	2,997.00
(i)	Trips to Kuala Lumpur between 22.7.95 to 10.8.95		
	(i) Ticket business class	28,305.00	2,830.50
	(ii) Accommodation (19 days x RM100)		1,900.00
	(iii) Miscellaneous — local expenses, food, etc		6,235.00
(j)	Trips to Kuala Lumpur		
	(i) Ticket business class	28,305.00	2,830.50
	(ii) Accommodation (45 days x RM100)		4,500.00
	(iii) Miscellaneous — local expenses, food, etc		7,925.00
(k)	Trips to Kuala Lumpur (7.3.96 to 29.3.96)		
	(i) Ticket business class	28,305.00	2,830.50
	(ii) Accommodation (23 days x RM100)		2,300.00
	(iii) Miscellaneous — local expenses, food, etc		8,430.00
(l)	Trips to Kuala Lumpur (2.12.97 to 14.12.97)		
	(i) Ticket business class	28,305.00	2,830.50
	(ii) Accommodation 12 days x RM100		1,200.00
	(iii) Miscellaneous — local expenses, food, etc		3,500.00
(m)	Trips to Kuala Lumpur (4.4.99 to 12.4.99)		
	(i) Ticket business class	28,305.00	2,830.50
	(ii) Accommodation (9 days x RM100)		900.00

	(iii) Miscellaneous — local expenses, food, etc		2,200.00
(n)	M/S Blanche Kayveas & Co		
(o)	Advocates & court fees in Madras	700,000.00	70,000.00
	Total		319, 219.29

In the final analysis, the plaintiff claimed against the defendant jointly and severally for:

(a) special damages of RM319,219.29;

(b) general damages;

(c) interest at the rate of 8% pa on the special damages from 5 January 1996 to the date of full realization;

(d) interest at the rate of 8% pa on the general damages from the date of award to the date of full realization;

(e) costs;

(f) further and other relief as this Honourable Court deems fit and proper to grant.

I have deliberately set out in some detail the facts as extracted from the statement of claim to show the magnitude of the plaintiff's case against both the defendants. This was a case of a foreign plaintiff who seeks redress in a Malaysian court against two Malaysian companies and the latter applied by way of encl 7 for security for costs against the plaintiff in the sum of RM150,000. Enclosure 7 is a summons in chambers supported by two affidavits. One affidavit was deposed by Wan Nor Azman bin Wan Salleh on behalf of the first defendant which was affirmed on 7 June 1999 and filed on the same date as seen in encl 6. The other affidavit was deposed by Che Azlina bte Abdul Aziz ('Che Azlina') on behalf of the second defendant and it was affirmed on 7 June 1999 and filed on the same date as reflected in encl 5. Each of the defendants requested for security for costs amounting to RM75,000 and when combined, it gives a grand total of RM150,000. The senior assistant registrar ('the SAR') by the name of Wan Azizon bte Ahmad heard encl 7 and gave judgment to the defendants with costs. She ordered the plaintiff to provide security for costs in the sum of RM80,000 for both the defendants. This meant that each of the two defendants is entitled to RM40,000 as security for costs. Aggrieved by the decision of the SAR, the plaintiff lodged an appeal to the judge in chambers as seen in encl 15.

The plaintiff affirmed an affidavit in encl 11 by way of a reply to encl 6. Enclosure 11 was affirmed on 28 July 1999 and it was filed on 2 August 1999. Since the affidavit of Wan Nor Azman bin Wan Salleh in encl 6 was identical to that of Che Azlina's affidavit in encl 5, the plaintiff averred that encl 11 should be relied upon mutatis mutandis by way of an answer to

encl 5. In response to encl 11, Wan Nor Azman bin Wan Salleh affirmed an affidavit on August 11, 1999 which was filed on August 12, 1999 as seen in encl 12. Che Azlina too affirmed an affidavit in encl 13 by way of a response to encl 11 and encl 13 was affirmed on 11 August 1999 and filed on 12 August 1999.

Now, the defendants' statement of defence was dated 24 May 1999 and it was filed on the same date as seen in encl 3. I will now endeavour to narrate the facts that can be distilled from the statement of defence. In so far as the status of the plaintiff was concerned and Dhanveer Enterprise having its head office at Bombay with a branch office at Madras, the defendants denied knowledge of them. The defendants admitted as to their status as set out in paras 2 and 3 of the statement of claim. In so far as it was said that the first defendant was under the control and/or management and/or direction of the second defendant and that the first defendant was said to have acted as the agent of the second defendant, the defendants denied them categorically and put the plaintiff to strict proof thereof. The first defendant was of the view that as a separate juristic person it was, at all times, acting on its own policies and procedures and that the first defendant was not at any time controlled or directed by the second defendant and accordingly the first defendant puts the plaintiff to strict proof thereof. The defendants denied that there was a 275 KV transmission line for phase 1 and phase 1A as alluded to in para 5 of the statement of claim; however, the second defendant admitted all the other matters as alluded to in the said paragraph in regard to the project. In so far as Ali was concerned, the first defendant admitted that Ali was appointed as the business development executive of the first defendant. But the first defendant had no knowledge of the appointment of Ali as the project manager by the second defendant. The second defendant too denied that Ali was appointed as its project manager and the second defendant said that it had no knowledge of the rest of the averments in para 6 of the statement of claim. In regard to the role of Ali who was said to have approached the plaintiff for the purpose of recruiting Indian workers in India for the project, the defendants categorically denied knowledge thereof and put the plaintiff to strict proof thereof. Again, in regard to the plaintiff agreeing to recruit Indian workers in India for the project and in regard to the plaintiff's entitlement to collect 35,000 Indian rupees which was equivalent to RM3,500 fees from each of the recruited Indian workers who would be employed by the defendants, the defendants categorically denied knowledge thereof and put the plaintiff to strict proof thereof. The defendants have no knowledge of the letter dated 16 April 1995 together with the power of attorney and in the alternative the defendants averred that these documents did not constitute a valid, binding or complete contract between the parties. Again by way of an alternative, it was averred that even if those two documents existed, which was denied, they were said to be written without the defendants' knowledge and neither was there an implied, apparent, ostensible or express authority of the defendants for those documents to be written. Further and/or in the alternative, the first defendant and/or in the alternative both the defendants averred that the letter dated 16 April 1995 and the power of attorney were

not issued by them or through the defendants' agents and/or servants and it was averred that Ali obtained those documents fraudulently; consequently, it was averred that the first defendant and/or in the alternative both the defendants were not bound by the contents and or the terms stated in those documents. Further it was averred that those two documents and other related documents, if any, were unlawfully issued without the express and/or implied knowledge and/or consent of the defendants. It was the stand of both the defendants that the alleged power of attorney was irregular in law and had no legal effect whatsoever. Both the defendants too averred that the alleged communication, if any and which was denied, that transpired between the plaintiff and Ali were only privy as between themselves and no one else. It was said that both the defendants were not privy to the alleged communications between the plaintiff and Ali at all. Both the defendants contended that the actions by Ali, if any and which were denied, were not sufficient to constitute any intention to create legal relations between the plaintiff and the defendants. Thus, there was no binding contract between them.

In any event, both the defendants averred that at all material times they never required workers, be it local or foreigner, because the project had been sub-contracted to a third party. It was the stand of both the defendants that the plaintiff had failed to exercise prudence when they relied on the representations made by Ali, if any and which was denied. It was alleged that the plaintiff failed to verify the veracity and authenticity of the alleged representation by Ali with the first defendant or for that matter with both the defendants. That being the case, both the defendants denied paras 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the statement of claim and put the plaintiff to strict proof thereof.

In so far as the letter dated 5 January 1996 which was purportedly written by the second defendant to the chief immigration officer of Anna International Airport, Menambakkam, Madras was concerned, both the defendants averred that they have no knowledge of the said letter and that letter, the existence of which was denied, was said to be written without the first defendant and/or in the alternative the knowledge of both the defendants. That letter too was said to be written without the express or implied, apparent or ostensible authority from the defendants. The same was also true in regard to the letter dated 4 January 1996 which the plaintiff received on 6 January 1996 in regard to the defendants' disclaimer and/or repudiation of the contract.

In regard to Wafa, the defendants denied categorically the allegations thereof. Both the defendants averred that, at no time, did the plaintiff inform them verbally or in writing that he would treat the alleged contract as terminated and would have recourse to the legal process. In this regard, the defendants put the plaintiff to strict proof thereof. In the premises, both the defendants denied paras 24, 25 and 26 of the statement of claim and again put the plaintiff to strict proof thereof. The defendants averred that the claim for damages was misconceived in law and in fact and categorically put the plaintiff to strict proof thereof. The defendants too averred that the statement of claim disclosed no cause of action against them.

Security for costs — the law in its perspective

Order 23 of the Rules of the High Court 1980 ('the RHC') governs the question of security for costs of an action and that order states as follows:

> (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court —
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
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> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or
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> (c) subject to para (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
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> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
>
> (2) The Court shall not require a plaintiff to give security by reason only of para (1)(c) if he satisfies the court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.
>
> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

Generally, the court has the discretionary power to order security for costs. Rule 1, para (1) of the RHC states that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do so'. In my considered view, these words meant a lot. It should be given its due recognition. These words have the desired effect of conferring upon the court a real discretion to consider the circumstances of each case and to determine whether and to what extent a plaintiff or the defendant, as the case may be, be ordered to provide security for costs. Thus, the court has the discretion:

> (i) to consider the circumstances of the case;
>
> (ii) and to decide whether to order security for costs; and
>
> (iii) to determine the quantum to be imposed for the security for costs.

Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 sets out the circumstances which the court might take into account in considering whether to order security for costs in the context of s 447 of the Companies Act 1948, which enacts as follows at p 284:

> Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by

credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

and his Lordship proceeded to say (see p 284 to p 286 of the report):

Does that section mean that the court must order security, or is it only that the court may in its discretion? There are some observations to the effect that it is mandatory. Thus in *Northampton Coal, Iron and Waggon Co v Midland Waggon Co* (1878) 7 Ch D 500 at 503, 504 James LJ said:

> '... I consider security for costs to be ex debito justitiae, and it is a very important matter whether a suitor is likely, if successful, to be able to obtain payment of his costs.'

In 1890, in *Pure Spirit Co v Fowler* (1890) 25 QBD 235 at p 237, Denman J said:

> '... the court is bound to order security for costs where the company is in liquidation, and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds.'

Those observations seem to have been the basis of a note which was contained in the Annual Practice until 1966 (1966) Vol 1, p 506. The note said that the wide discretion conferred on the court in other cases 'does not apply to security ordered under' s 447.

I do not think those observations are correct. I prefer to follow the cases ie *Ebury Garages Ltd v Agard* (1933) 76 LJ 204, *Gill All Weather Bodies Ltd v All Weather Motor Bodies Ltd* (1934) 77 LJ 123 which are to be found in the notes in the *Law Journal Newspaper*. Scrutton LJ said that there were too many applications against companies for security for costs.. In his view 'the powers of the section should be carefully used'. Maugham LJ said:

> 'The section only confers a discretion on the court. There may be many cases where a company is insolvent, and yet the court would not order security to be lodged.'

I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard and Co Ltd v Bogoff* [1962] IR 180. Kingsmill Moore J said at p 188:

> '... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may be exercised in special circumstances.'

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case. Mars-Jones J, in a full and careful judgment, took that view. He upset the master's order. He refused to order security for costs. Counsel for Parkinson asked for leave to appeal. He put it on the ground that it was an important point whether or not the court had discretion. It was so important that four or five solicitors were waiting in the court to hear the result of it. The judge gave leave to appeal.

Now before us counsel for Parkinson concedes that his argument was wrong and that the judge was right. There seems to have been some misapprehension on the matter in the past. The sooner it is put right the

better. If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively — so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

Counsel for Parkinson accepted that most of these were matters proper for consideration, but he urged that it was not legitimate to take into account a payment into court, or, as in this case, the open offer of a sum. But counsel for Triplan said it was an important matter which should be taken into account.

There is little authority on this matter. In *Hogan v Hogan (No 2)* [1924] 2 IR 14, the court did take into account a payment into court. The report is a little confused. At one point it says that £80 was paid into court 'with a denial of liability'; and a few lines later the defendant 'admits the plaintiff is entitled to £80'. But howsoever that may be, I am quite clear that a payment into court, or an open offer, is a matter which the court can take into account. It goes to show that there is substance in the claim; and that it would not be right to deprive the company of it by insisting on security for costs. The judge took the offer into account here. He was fully entitled so to do. Looking at the matter quite generally, the claim of Triplan does seem to be a bona fide claim and to have a reasonable prospect of success, at least in part. And when one adds to that the fact that this application was made at a late hour on the Thursday when the arbitration was due to start on the Monday, I am quite clear that it was not a case for ordering Triplan to provide any security for costs at all.

I find myself in entire agreement with the judge. It is not a case for security for costs; and I would dismiss this appeal accordingly.

Of crucial importance, fit for consideration, would be the likelihood of the plaintiff succeeding. The court may refuse the defendant's application for security for costs when there is a strong prima facie presumption that the defendant will fail in his defence (*Crozat v Brogden* [1894] 2 QB 30 at p 33, per Collins J). Then there is the rule which says that it may be a denial of justice to order a plaintiff to give security for the costs of the defendant who has, in fact, no defence to the claim at all. If the defendant admits part of the claim, then the court may refuse him security (*Hogan v Hogan (No 2)* [1924] 1 IR 14). In the event the defendant admits his liability to the fullest extent, then the plaintiff will not be ordered to give security (*De St Martin v Davis & Co* (1884) WN 86) and this would be so even if the defendant were to counterclaim (*Winterfield v Bradnum* [1878] 3 QBD 324). The defendants in the present case were challenging all the points raised by the

plaintiff, and it cannot be said with certainty that the plaintiff would succeed. This was also not a case where, prima facie, the defendants would fail in their defence. I shall demonstrate, in due course, by reference to the arguments of the parties. Meanwhile, I shall proceed to examine the law on security for costs. The case of *Egbert v Short* [1907] 2 Ch 205 is a classic example where the court ordered the plaintiff to pay the defendants' costs. In that case, the plaintiff was restrained from proceeding in the English courts for the following reasons:

(1) the cause of action arose in India;

(2) the witnesses were in India;

(3) the applicable law to be applied and adopted would be the law of India; and

(4) both the parties resided in India.

The plaintiff was visiting England when the proceedings were instituted. On these facts, the court held that the proceedings have not been brought bona fide in England. So the court ordered the plaintiff to pay the defendant's costs, which costs were ordered to be paid out of the fund paid into court as security for those costs. Obviously the court was concerned in protecting the defendant.

Another case to consider would be that of *Polini v Gray* [1879] Ch D 741. That was a case where an action was taken to restrain a successful litigant from dealing with funds lodged in court pending appeal so as to prevent a successful party on appeal from obtaining a hollow victory devoid of any monetary benefit. Jessel MR in a well written judgment observed that:

> The plaintiffs allege ... success will be useless to them unless an interim order is made preserving the fund ... The question is whether this court has the jurisdiction to prevent such a consequence. It appears to me as principle that the court ought to possess that jurisdiction because the principle which underlies all orders for the preservation of property is ... that ... the successful party, is to reap the fruits of that litigation, and not obtain merely a barren success.

Next, it would be the case of *JH Billington Ltd v Billington* [1907] 2 KB 106, a decision of the court of King's Bench which immediately recognized that it had jurisdiction to order security as part of its general power to regulate process and procedure. Phillimore J at p 111 of the report, aptly said that:

> Instances of the exercise of this power have grown up from time to time pro re nata as the court has thought proper; for example, in the case where the plaintiff a foreigner the court has ordered security for costs to be given without any statutory power being conferred upon it.

My research shows that the case of *Pray v Edie* (1786) 1 TR 267, 99 ER 1087 was the first case of its kind where the practice of requiring foreign litigants to provide security was first mooted. This basically was due to the enormous difficulties of enforcing orders of the English courts in foreign jurisdictions. In *Crozat v Brogden*, the plaintiff tirelessly sought to enforce a

judgment which he had obtained in France. Despite the existence of that judgment, the plaintiff was still required to relitigate the matter once again. To confound the matter further, Davey LJ refused to examine the merits of the case and forthwith ordered the plaintiff to provide security.

The law developed with the time. Eventually in England a practice was evolved which require a litigant who was resident abroad to provide security unless the litigant had fixed and permanent assets within the jurisdiction or was a co-plaintiff. In *Re Alabama Portland Cement Co Ltd* [1909] WN 157, the court was of the view that a litigant residing abroad was considered not to be within the jurisdiction in order to be governed by the procedure for costs and so the litigant must provide security.

It must be recalled that Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* held that the court had an unfettered discretion to be exercised in all the circumstances of the case. Lawton LJ too agreed with the approach of Lord Denning MR and they both decided that there was no substantive burden of proof on either party. Cairns LJ, in the minority, in *Parkinson*'s case held that the discretion should only be exercised to refuse security if there were 'special circumstances'.

Right after the case of *Parkinson*, there was a case of *Buckley v Bennell Design & Constructions Pty Ltd* [1974] 1 ACLR 301 where Street CJ at p 305 of the report remarked that:

> ... the discretion could properly be regarded as ordinarily exercisable so as to protect a defendant sued by an impecunious company, but that, if the court in any case takes the view that this protection should not be afforded to the defendant, it has an unlimited and unrestricted discretion to give effect to such view without having to look for special circumstances.

Street CJ continued further in a serious vein at the same page of the report in these trenchant terms:

> I prefer to regard the discretion conferred by the section as being one which should be exercised merely with a predisposition in favour of the defendant party.

Lord Denning's judgment has always, thus far, survived the test of time. The South Australian Full Court in *Heller Factors Pty Ltd v John Arnold's Surf Shop Pty Ltd (in liquidation)* [1979] ACLC 40 favoured the test enunciated by Lord Denning MR in the *Parkinson*'s case. Not only that an array of cases have since emerged — all supporting the test of Lord Denning MR in the *Parkinson*'s case. The following anthology of cases would suffice for the moment:

(1) the Queensland Full Court in *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523;

(2) the Full Court of Western Australia in *Westralian Gold Mines Ltd v Westralian Minerals & Drilling Pty Ltd (in liquidation)* [1986] 1 ACLC 167;

(3) the Federal Court in *MA Productions Pty Ltd v Austarama Television Pty Ltd* [1982] 1 ACLC 404; and last but not least,

(4) by Burchett J in *Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates (Australia) Pty Ltd* (1986) 11 ACLR 43. A

It would be interesting to note that the Full Court of the Federal Court in *Bell Wholesale Co Pty Ltd v Gates Export Corp (No 2)* (1984) 8 ACLR 588 held that the discretion to grant security was unfettered and that each case must depend upon its own circumstances. As I said, Lord Denning MR in B the *Parkinson*'s case listed some of the matters which the court might take into account in the exercise of its discretion (see [1973] QB 609 at p 626) and I need to reproduce them here by way of a summary:

(a) whether the company's claim is bona fide and not a sham;

(b) whether the company has a reasonably good prospect of success; C

(c) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

(d) if there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim);

(e) whether the application for security was being used oppressively and so as to try and stifle a genuine claim; D

(f) whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

Rath J in *Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd* [1983] 1 ACLC 967 listed down the relevant matters to be considered in E the exercise of the court's discretion to grant security following closely the items set out by Lord Denning MR in the *Parkinson*'s case. The same items were also listed by Needham J in *MA Productions Pty Ltd v Austarama Television Pty Ltd* where at p 407 of the report his Lordship said:

> First, the court can consider the strength and bona fides of the plaintiff's case. F Secondly, whether the defendants' application for security is oppressive in the sense that it is being used merely to deny to an impecunious plaintiff a right to litigate. Thirdly, the court can consider whether the want of assets experienced by the plaintiff is caused by the default of the defendants. Fourthly, whether the order, if made, would stultify the plaintiff's action.

G

In short, no two cases would be the same. One must examine and have regard 'to all the circumstances of the case'. Impecunious plaintiff should be ordered to pay security for costs and this would be the balancing act that ought to weigh the pendulum of justice evenly.

All these authorities and the principles distilled from them serve as useful guidelines to adjudicate encl 15. I will now examine the arguments H advanced by the parties. Incidentally all the affidavits connected with encl 15 bore the same facts as the statement of claim and the statement of defence; thus, there was no need for me to regurgitate those facts again.

The plaintiff is ordinarily resident out of the jurisdiction I

It must be recalled that Dhanveer Enterprise's head office is at Bombay, India while its branch office is at Madras, India. The plaintiff's address is at

Mumbai, India. Obviously the plaintiff as well as Dhanveer Enterprise are definitely out of the jurisdiction of this court. In my judgment, the plaintiff can safely be described to be ordinarily resident out of the jurisdiction (*Levene v IRC* [1928] AC 217; and *Lysaght v IRC* [1928] AC 234). It is purely a matter of discretion for the court to insist that the foreign plaintiff be ordered to give security for costs because it is the only just thing to do (*Aeronave SPA & Anor v Westland Charters Ltd & Ors* [1971] 1 WLR 1445, [1971] 3 All ER 531 (CA)). Mr DP Vijandran, learned counsel for the plaintiff, pointed out that this point cannot be the only deciding factor to decide the fate of the plaintiff in so far as encl 15 was concerned. Mr Collin Sequerah, learned counsel for both the defendants, argued that it was entirely the court's discretion to decide whether security for costs should be ordered against the plaintiff in favour of both the defendants.

My attention was drawn to the case of *Ho Kai Neo (widow) & Anor v Tan Kim Tee & Anor* [1940] MLJ 84, a decision of Laville J. That was a case where the facts were entirely different from the present appeal. It was a case where the defendants applied that the plaintiff should give security for costs in the sum of $1,500 on the ground that the plaintiff was ordinarily resident out of the State. The suit was by the widow and a son as executor and beneficiary against the creditor — administrator of her husband's estate in Johore for breach of trust. It was conceded by the plaintiff that she resided out of the jurisdiction and was a woman of no substance and that she cannot raise $750 as security but nevertheless, it was argued by her counsel that the usual rule that a plaintiff who resided out of the jurisdiction should put up security for the defendants' costs did not apply to her. At p 85 of the report, Laville J had this to say:

> The defendants in their affidavit supporting this summons give as one of the reasons for demanding security for costs the fact of non-residence in the State.
>
> The case of *Raeburn v Andrews* 9 QBC 118 together with *Wakely v The Triumph Cycle Co Ltd* [1924] 1 KB 214 makes it clear that where the courts of the country in which the plaintiff resides will enforce and have easy and convenient means of enforcing the judgments of the foreign court in which the plaintiff sues, even the inflexibility of the English rule is relaxed and a non-resident plaintiff with no assets in the country of trial will not necessarily be called on for security. The connection between the Johore Courts and the Colony Courts is close and the means of enforcing the judgments of the superior Courts of either in the territory of the other ample and convenient. On this ground therefore there is no reason why the plaintiffs should be called on to give security for costs.

Mohamed Dzaiddin J (now FCJ) in the Penang High Court in the case of *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310 had occasion to decide on the issue of security for costs. In that case, the plaintiff carried on business in Bangalore, India. Its managing partner, an Indian national, also resided there. The plaintiff sought to enforce the Award of Arbitration No 1917 dated 28 January 1980 which was adjudicated by the arbitrators in London. The defendants were contesting the legality of the arbitration award and were applying for an order requiring the plaintiff to

furnish security for costs before the main application was heard. The question was whether it was just to order security for costs. The court ordered the plaintiff to furnish security for costs. In a well written judgment, his Lordship Mohamed Dzaiddin J (now FCJ) at p 311 of the report aptly said:

> Order 23 r 1(i) provides that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do so.' 'These words have the effect of conferring upon the court the real discretion and indeed the court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.' (*Supreme Court Practice* 1985 Vol 1 p 384). In exercising its discretion, it is clear that the court will have regard to all the circumstances of the case. For the circumstances, see per Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273.
>
> However, in *Aeronave SPA & Anor v Westland Charters Ltd and Ors*, [1971] 3 All ER 531 Lord Denning MR in his judgment at p 533 stated as follows:
>
> > 'I agree ... that the rule does give a discretion to the court. In 1894 in *Crozat v Brogden* Lopes LJ said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order ... The ordinary rule still remains, that it is a matter of discretion.'
>
> In the present case, the question is simply whether or not it is just to order security for costs? In my opinion, two major considerations clearly merit my attention. The first consideration is of course the fact that the plaintiff is ordinarily resident out of this jurisdiction. Admittedly, under r 1(i), security for cost cannot now be ordered as of right from a foreign plaintiff, but only if the court thinks it just to order depending on the circumstances of the case. Secondly, it is material to consider one of the grounds of the defendants in disputing the plaintiff's main application. It is deposed by Mr Chan that the enforcement of the award is contrary to public policy and the laws of Malaysia. Here, it is pertinent to ask whether or not the plaintiff has complied with O 69 r 6 of the Rules of the High Court 1980. Under this rule the present award by the Arbitrators become enforceable in the same manner as a judgment given by a court in the United Kingdom under the Reciprocal Enforcement of Judgments Act 1958. Section 4 of the Act provides that a Judgment Creditor may apply to the High Court at any time within six years after the date of the judgment or after the date of the last judgment given to have the said judgment registered in the High Court. Order 67 provides the procedure for such an application which must be supported by an affidavit exhibiting among other things the judgment or certified copy thereof. If the order is granted the judgment must be registered and notice of registration must be served on the Judgment Debtor. From the affidavits of the parties it is quite clear that nowhere was any mention made by the plaintiff regarding the registration of

A the Arbitrators Award in this Court or notice thereof. The inference here is that the plaintiff may not have complied with O 69 r 6. Undoubtedly, this is, of course, one of the issues to be contested in the main application as being contrary to the laws of Malaysia.

However, for the present application I am satisfied that the defendants should be entitled to an order sought for. Accordingly, in the exercise of my B discretion I order the plaintiff to deposit a sum of $10,000 into court being security for costs before the next hearing date. Costs of this application shall be costs in the cause.

Pure and simple, the plaintiff was outside jurisdiction. Not only that the plaintiff too had no assets in Malaysia and this fact was not disputed at all. C It would simply be a matter of pure discretion nay to be exercised judicially, having regard to all the circumstances of the case, to decide whether to order security for costs or otherwise. In the words of Hill JA in *Shaik Ali v Shaik Mohamed* [1963] MLJ 300 at p 301:

> It is quite clear that the court has a discretion in the matter. It is also clear that in the case of a plaintiff, and the applicant should be treated as a plaintiff in D the present circumstances, who is out of the jurisdiction and who has no property or assets in the country, that the discretion seems to be invariably exercised in favour of making an order for security for costs.

and I share the sentiments expressed by his Lordship and, accordingly, the plaintiff here should be ordered to pay security for costs. This was a case of E a foreign plaintiff with no property at all in Malaysia (*Hudson Strumpffabrik GmbH v Bentley Engineering Co Ltd* [1962] 3 All ER 460; [1962] 2 QB 587; and *Mavani v Ralli Bros Ltd* [1973] 1 WLR 468).

> The plaintiff conducts business outside the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972) ('REJA').

F Mr Collin Sequerah for the defendants rightly argued that Madras was excluded from the First Schedule of REJA and in the event the plaintiff were to lose his case, there was no restriction or no impediment for the plaintiff to move to Madras from Bombay or for that matter to any other excluded State in India to evade paying costs. The First Schedule to REJA enacts as G follows (the relevant ones only):

Reciprocating Countries

Reciprocating countries	Superior courts
India (excluding State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra)	The High Court.

H

I The defendants' fear were well founded. It would be useless to obtain a paper judgment and unable to reap the fruit of its success. It would be most exasperating. Why was the plaintiff's address at Mumbai, India was not set out in the statement of claim? There was no attempt at explaining this

failure to state the plaintiff's address at Mumbai, India in any of the affidavits. If there was no intention to deceive, why was there an absence of an explanation in the affidavits of the plaintiff. (*Chellew v Brown* [1923] 2 KB 844; and *Pittsburgh Crushed Steel Co v Jacob Marx & Co* [1897] WN 36). Surely this would be another good reason to order the plaintiff to give security for costs.

The headnote to the case of *Coldham v The Raub Australian Gold Mining Co Ltd* [1940] MLJ 50 makes for interesting reading. It is worded as follows:

> A plaintiff ordinarily resident outside the jurisdiction of the court, will generally be ordered to give security for costs. If, however, he resides in a country where provision exists for the reciprocal enforcement of judgments with the country in which the suit is instituted, then security for costs will not be required to be furnished.

Zainun Ali JC (now Judge) in *Adarsh Pandit v Viking Engineering Sdn Bhd* [1998] 2 AMR 1009 had occasion to address the issue of security for costs and there her Ladyship ordered the foreign plaintiff to pay RM45,000 as security for costs, approximately about $^1/_4$ of the plaintiff's claim of RM200,000. At p 1016 to p 1017 of the report, her Ladyship examined the relevant authorities and said:

> Thus following the principles as are found in authorities such as *Lek Swee Hua v American Express* [1991] 2 MLJ 151 and *Slazenger v Seaspeed Ferries* [1987] 1 WLR 1197, the court has a discretion to order security for costs to be furnished by a foreigner plaintiff even where there are co-plaintiffs resident within the jurisdiction.
>
> In the present case, there is not even the presence of a co-plaintiff resident in these parts, who could be relied upon should the need arise to meet claims, if any.
>
> It is undisputed that the plaintiff has no property within jurisdiction. As case laws such as *Shaik Ali v Shaik Mohamed* [1983] MLJ 310 and *Ace King Ltd v Circus American Ltd & Ors* [1985] 2 MLJ 75 have shown, courts are more likely to order security for costs to be given to the defendant in such circumstances, since it is clear as illustrated by Lord Denning MR in *Aeronave SPA & Westland Charters* [1971] 1 WLR 1146 that:
>
> > 'It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order.'
>
> Even assuming that the plaintiff has property within jurisdiction, it is not sufficient ground for this court to allow security. Moreover the mere fact of the plaintiff owning property in a country which has reciprocal enforcement of judgment agreement with Malaysia, is not also a ground for the court refusing to order security, since the enforcement is not automatic. This point is illustrated in the case of *Faridah Begum* [1995] 2 MLJ 404 and *Ng Hui Lip* [1951] MLJ 57, which is distinguished from *Coldham v Rant Australia Gold Mining Co* [1940] MLJ 50.

At p 1018 of the report, her Ladyship continued in serious vein:

> The plaintiff made much also of the nature of this application, stating that it is oppressive to him and would suppress his claim which is said to be genuine.
>
> This question though relevant, does not arise here. In any case, the question of oppression alone even if it exists, is not sufficient reason not to grant the order.
>
> The plaintiff made much also of the likelihood of the plaintiff's success in this matter. The plaintiff submitted that this is based as it were, on the plaintiff's success in the O 14 application both before the registrar and before the Judge in Chambers. The plaintiff argued that the Federal Court did not hear the merits of the case but proceeded to grant conditional leave to the defendant.
>
> I will say this here and now, that it is not in every application such as this that the merits of the case will be examined.
>
> As clearly illustrated in the case of *Porzelack KG v Porzelack UK (Ltd)* [1987] 1 All ER 1074, parties should not attempt to go into the merits of the case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success.

Ariffin Zakaria J in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404 ordered the plaintiff, a Singaporean, who was ordinarily resident out of jurisdiction and who had failed to state her permanent address and who was a bankrupt and who did not have sufficient assets within jurisdiction to pay RM15,000 into court as security for costs.

All these authorities serve as mere guidelines. Each case tells a story of its own. Each case gives the factual matrix that will strike a chord with the existing authorities and would definitely be easier to handle and adjudicate. In the present appeal, the SAR dutifully followed the formula expounded by her Ladyship Zainun Ali JC (now Judge) in *Adarsh Pandit v Viking Engineering Sdn Bhd* by ordering the plaintiff to pay RM80,000 as security for costs on the basis of approximately $^1/_4$ out of the sum of RM319,219.29 as claimed by the plaintiff and I entirely agree with the decision of the SAR.

Assets belonging to the plaintiff in India were frozen by the Indian authorities

The defendants were faulted. It was said that the government authorities in India were not happy with the plaintiff for having cheated those Indian workers that responded to the recruitment drive. The plaintiff blamed the defendants for the predicament in which he was now facing. The defendants' stand were quite simple. It was Ali that had orchestrated the whole thing. It was said that Ali was not authorized to do what he did and that Ali went on a frolic of his own. This was certainly an issue that require a detailed examination of the facts of the whole case. It was not a simple shut and close case. It was a pure question of law as to whether Ali had apparent or ostensible authority to do what he did. It is here that the law of agency comes into play. *Bowstead on Agency* (12th Ed), art 2 defines agency as:

> ... the relationship that exists between two persons, one of whom, the principal, expressly or impliedly consents that the other, the agent, similarly consenting, should represent him or act on his behalf.

Professor Seavey in *The Rationale of Agency* (1920) 29 Yale LJ 859 at p 868 describes agency as:

> ... a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other.

It is therefore correct to say and I so say that the law of agency is concerned with the powers and liabilities of principal and agent particularly in regard to the powers of the agent and the liabilities of the principal. Ali's role as an agent was challenged by the defendants vehemently. Pure and simple the defendant's stand was that Ali had no authority to do what he had done. The defendants did not ratify the acts of Ali. This was certainly not a case where the defendants gave validity to Ali's unauthorized acts by way of ratification. Tindal CJ in *Wilson v Tumman* (1843) 6 Man & G 236 at p 242 explained the effect of ratification in these salient words:

> That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established principle of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same effect as by, and with all the consequences which follow from the same act done by his previous authority.

By ratification, the agent is being treated as having been authorized from the very beginning to act in the manner in which he did. So much for the law on agency. Reverting back to the mainstream of the case, an argument was advanced that in the event the plaintiff wins the case, the government of India would lift the embargo, so to speak, and the matter would come to an end. That would be on the footing that the plaintiff would win and, in any event, if the plaintiff wins the question of the defendants' costs would not arise at all. But, alas, there was no affidavit evidence from the Indian official in India to say that if the plaintiff wins, the Indian Government would lift the sanction on the plaintiff's assets. It was a mere speculation bereft of any evidential value. Indeed, Mr DP Vijandran unabashedly admitted that there was no affidavit forthcoming from the Indian official and he even said that it was also difficult to procure an affidavit from an official from India. So much for the Indian red tape.

Mr DP Vijandran submitted that the scales were equally balanced and in the event it tilt, it would tilt in favour of the plaintiff. I beg to disagree. The scales of justice, for the foregoing reasons, tilted in favour of the defendants. Having regard to the circumstances of the case, security for costs should be ordered against the plaintiff.

The merits of the case

In an application for security for costs, it would be too premature to examine the merits of the case in great detail. It was not the time and place

A to delve into the deeper aspects of the case. In the words of Sir Nicolas Browne–Wilkinson VC in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at p 1077:

> The matters urged before me have spread over a fairly wide field. First there have been attempts to go into the likelihood of the plaintiff winning the case or the defendant winning the case, presumably following the note in the *Supreme Court Practice* 1985 Vol 1, para 23/1–3/2, which says: '... A major matter for consideration is the likelihood of the plaintiff succeeding ...' This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
>
> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

Even the Court of Appeal in *Trident International Freight Services Ltd v Manchester Ship Canal Co & Anor* (1990) BCLC 263 was of the view that in an application for security for costs it was not appropriate to go into the merits of the case unless it can be clearly demonstrated, one way or the other, that there was a high probability of success or failure.

I have in the early part of this judgment set out in extenso the facts of the case as garnered from the pleadings without going into the merits of the case. There was no necessity at all, at this juncture, to go into a minute and in depth detail of the merits of the case. In evaluating the prospects of success of either party, I must shy away from a very detailed evaluation of the merits of the case. Suffice for me to say that there was available evidence to direct the plaintiff to provide security for costs. This was my judgment and I so ordered accordingly.

Whether the plaintiff's claim was bona fide?

It would be very difficult to evaluate the prospects of success of the plaintiff's case at this stage. Nevertheless, an argument was advanced to the effect that the plaintiff has demonstrated a genuine interest in having the matter adjudicated in a court of law. (*Ho Kai Neo & Anor v Tan Kim Tee & Anor*, at p 67 right hand column, last line to p 68 left hand column at A). It was pointed out that the plaintiff has filed the list of documents promptly in conformity and in pursuance to O 24 r 1 of the RHC. It was said that the plaintiff's claim was bona fide. That the summons for directions had been filed and the plaintiff had duly prosecuted the case. It was also said that the plaintiff was pursuing the matter diligently. The plaintiff said that the

current difficulties encountered by the plaintiff were all due to the defendants. But, with respect, all these arguments must be viewed in the context of the circumstances of the whole case. I repeat that this was a case of a foreign plaintiff with no assets within jurisdiction (*Shaik Ali v Shaik Mohamed*; and *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75). This was a case of a foreign plaintiff outside jurisdiction and with no postal address in Malaysia unlike the case of *Abdul Fattah Mogawan & Anor v MMC Power Sdn Bhd & Anor* [1997] 5 CLJ 1. Surely the Malaysian courts, in view of these facts, must swing in favour of the Malaysian defendants by ordering the plaintiff to tender security for costs. The plaintiffs' claim was quite substantial. The Malaysian defendants must be protected as a matter of public policy.

In *Compagnie Generale Des Eaux v Compagnie Generale Des Eaux Sdn Bhd* [1993] 1 MLJ 55, the situation was far better than the facts of the present case. That was a case where the company was not registered in Malaysia and the court considered it as not within the jurisdiction even though the company had established goodwill, reputation and made its presence felt locally. On these facts, the court there exercised its discretion to order security for costs. Here, in the present appeal, the plaintiff is a foreigner and had not even established goodwill, reputation nor made its presence felt in Malaysia and surely the plaintiff must be ordered to pay security for costs.

Stifling the plaintiff's action

This point was taken in an attempt to persuade me not to order security for costs. It must be borne in mind that it was the plaintiff that instituted the suit and the defendants were merely exercising their legal rights to defend themselves. The plaintiff chose to litigate in Malaysia and they must submit to the jurisdiction of the Malaysian courts.

Conclusion

All the circumstances of the case have been considered by me in adjudicating the appeal to the judge in chambers in encl 15. The nett result would be obvious. Enclosure 15 should be dismissed with costs.

Appeal dismissed.

Reported by Jafisah Jaafar